



October 24, 2018

Federal Communications Commission  
Commission's Secretary  
445 12<sup>th</sup> St. SW  
Room TW-A325  
Washington, DC 20554

**Re:** *Reply Comments on Public Notice Seeking Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego LLC Decision*

To Whom It May Concern:

Quicken Loans is pleased to submit comments on the *Public Notice Seeking Further Comment on Interpretation of the Telephone Consumer Protection Act ("TCPA") in Light of the Ninth Circuit's Marks v. Crunch San Diego LLC Decision*.<sup>1</sup> We appreciate the Federal Communications Commission's ("FCC" and "Commission") leadership in continuing efforts to reform the outdated TCPA and file these reply comments in support of the letter filed by the American Financial Services Association ("AFSA") and Consumer Mortgage Coalition ("CMC") calling for a clear autodialer definition as well as to emphasize the points below.<sup>2</sup>

## **BACKGROUND**

As background, Detroit-based Quicken Loans is the nation's largest home mortgage lender. The company closed more than \$400 billion of mortgage volume across all 50 states from 2013 through 2017. Quicken Loans moved its headquarters to downtown Detroit in 2010. Today, Quicken Loans and its Family of Companies employ more than 17,000 full-time team members in Detroit's urban core. The company generates loan production from web centers located in Detroit, Cleveland and Phoenix. Quicken Loans also operates a centralized loan processing facility in Detroit, as well as its San Diego-based One Reverse Mortgage unit. Quicken Loans ranked highest in the country for customer satisfaction for primary mortgage origination by J.D. Power for the past eight consecutive years, 2010 – 2017, and also ranked highest in the country for customer satisfaction among all mortgage servicers the past five consecutive years, 2014 – 2018.

Quicken Loans was once again named to FORTUNE magazine's "100 Best Companies to Work For" list in 2018 and has been included in the magazine's top 1/3rd of companies named to the list for the past 15 consecutive years. In addition, Essence Magazine named Quicken Loans "#1 Place to Work in the Country for African Americans."

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<sup>1</sup> Public Notice Seeking Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego LLC Decision, FCC 18-1014, CG Docket No. 18-152 & 02-278, FCC (2018)

<sup>2</sup> See Comments of the American Financial Services Association and Consumer Mortgage Coalition, CG Docket Nos. 02-278, 18-152 (filed October 17, 2018)

## **EVERY CLIENT. EVERY TIME.**

Quicken Loans does not follow the traditional “brick and mortar” model. We’ve proudly built an internet mortgage lending process that is dedicated to the best client experience possible. Our clients’ happiness is our #1 priority. Our successful, centralized business model relies heavily on our ability to transact business by telephone.

When the TCPA was enacted, wireless telephones were a luxury item and charges for receiving calls on a wireless telephone were prohibitively expensive. As the Commission has acknowledged, “wireless use has expanded tremendously since the passage of the TCPA in 1991.”<sup>3</sup> Today, 90 percent of Americans own wireless telephones and almost half or 53.3 percent of households are entirely or predominantly “wireless-only.”<sup>4</sup> This effect is even more pronounced among our client population; 64.5% of our largest client base, those between the ages of 45-64, live with only wireless telephones.<sup>5</sup> In fact, even those who have and use a landline are likely to give their cell phone number for contact because they are often away from their home during the day and won’t be home to answer their landline phone.

As consumer reliance on cell phones has changed drastically since the TCPA effective date, it continually becomes more difficult to communicate with consumers other than by calling them on their cell phones.

## **A NEED FOR AUTODIALER CLARIFICATION**

The TCPA’s restrictions have a chilling effect on communication between businesses and consumers. Businesses’ fears of TCPA litigation and related damages dampens a company’s willingness to use new and evolving technology to their and their customer’s advantage. We continue to urge the FCC to reform regulations and provide clarity on some unclear TCPA provisions, including the autodialer definition.

The lack of clarity in the autodialer definition makes it nearly impossible for businesses to know if they are compliant when calling clients, even if they want to manually dial. The current law hurts the ability for businesses to provide the best client service possible. We urge the FCC to clearly define autodialer. Further, we suggest the autodialer definition require the use of device that as presently configured<sup>6</sup> generates random or sequential numbers and calls them without human intervention. We also urge the FCC to take the ACA court’s suggestion to adopt Commissioner O’Rielly’s interpretation of the words “make any call” to limit application of the TCPA those who use an autodialer *as an autodialer*.

Notably:

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<sup>3</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd 1830, 29 (2012) (“2012 TCPA Order”).

<sup>4</sup> Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2017 (June 2018) (“CDC Wireless Substitution Estimates”), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf>.

<sup>5</sup> Blumberg & Luke, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey

<sup>6</sup> Two Federal Circuits have so held after the ACA case. *King v. Time Warner Cable, Inc.* 894 F.3d 473 (2d Cir. 2018); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018).

The dissenting commissioner's interpretation would substantially diminish the practical significance of the Commission's expansive understanding of "capacity" in the autodialer definition. Even if the definition encompasses any device capable of gaining autodialer functionality through the downloading of software, the mere possibility of adding those features would not matter unless they were downloaded and used to make calls. . . everyday calls made with a smartphone would not infringe the statute: the fact that a smartphone could be configured to function as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages.

ACA 885 F.3d at 704.

### **SPECIFIC COMMENTS**

In coordination with the AFSA/CMC comments, we respond to the specific Public Notice questions below:

1. *To the extent the statutory definition is ambiguous, how should the Commission exercise its discretion to interpret such ambiguities here?*

Both the ACA Court and the Marks Court held that the "capacity . . . to be dialed" language is ambiguous, but they reach seemingly inconsistent results. We can harmonize the cases: Both Courts say it's up to the FCC. As the *Marks* Court put it "the statutory text is ambiguous on its face. The D.C. Circuit apparently agreed, stating that "[i]t might be permissible" for the FCC to adopt an interpretation that a device had to generate random or sequential numbers in order to be an ATDS, or that a device could be an ATDS if it was limited to dialing numbers from a stored list." *Marks*, 2018 WL 4495553 at 8.

The *Marks* Court found the phrase: "capacity . . .to store or produce telephone numbers to be called, using a random or sequential number generator," capable of two different readings, and chose the broader one. *Marks*, free of a conflicting FCC interpretation, read "store" as a separate way of triggering the autodialer definition and held that that calls placed from devices with nothing more than the capacity to store and dial numbers are autodialed calls under the TCPA—regardless of whether that functionality was used to make the call The ACA court, as cited by *Marks*, though, recognized that it is possible to read the statute, a little more naturally as applying the "random and sequential" language to both stored and produced numbers.<sup>7</sup> Both *Marks* and ACA permit the FCC to read it that way.

2. *Does the interpretation of the Marks court mean that any device with the capacity to dial stored numbers automatically is an automatic telephone dialing system?*

Yes. "Accordingly, we read [§ 227\(a\)\(1\)](#) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called . . . and to dial such numbers." *Marks*, at 9.

3. *What devices have the capacity to store numbers? Do smartphones have such capacity?*

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<sup>7</sup> See *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927 (N.D. Ill. 2018) (so holding).

Any device with a redial or contacts function has the capacity to store numbers. Early flip phones, PDAs, and thumb-drives qualify. Yes, smartphones have that capacity.

*4. What devices that can store numbers also have the capacity to automatically dial such numbers? Do smartphones have the capacity?*

It depends on the definition of “automatically.” If that term includes dialing that requires a human to initiate it, then early mobile phones, computers, smart phones—any phone with redial. Yes, smartphones have the capacity subject to our comment above about “automatically.”

*5. In short, how should the Commission address these two court holdings?*

The Commission can reconcile the two holdings by:

- Interpreting autodialer to mean *equipment with the present capacity*:
  - *To store or produce numbers;*
  - *Using a random or sequential number generator; and*
  - *Dial them*
- Interpreting *capacity* to mean *present capacity*; and
- Interpreting *make a call* to mean call using *an autodialer as an autodialer*, as suggested by *ACA*.

This harmonizes *ACA*, which warns of an expansive definition, and *Marks*, which sees the statute as ambiguous and recognizes the Commission’s authority to interpret the statute narrowly.

*6. We also seek comment on any other issues addressed in the Marks decision that the Commission should consider in interpreting the definition of an “automatic telephone dialing system.”*

Please see our comments above about *ACA*’s suggested reading of “make a call.”

## **Conclusion**

We appreciate the opportunity to comment and urge the Commission to review other areas of the TCPA in need of reform. We look forward to a continued dialogue with the FCC as it examines how to stop bad actors and calls that harm the consumer and hurt business communications. Should you have any further questions, please contact me at [garyweingarden@quickenloans.com](mailto:garyweingarden@quickenloans.com) or 313-373-4554.



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